

File

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of Whether a Declassification)	
of Land Owned by Roger E. Nichols, Located)	
in the Town of Gilman, Pierce County, from)	Case No. IH-95-10
Entry Under the Woodland Tax Law May)	
Include a Penalty Under Section 77.16(11),)	
Stats.)	

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER

Pursuant to due Notice a prehearing conference was conducted by telephone on August 3, 1995, Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presiding. The parties agreed to waive their right to hearing and have the matter decided on the basis of stipulated facts and the submission of written briefs. The last brief was received on November 24, 1995. Pursuant to Division practice, November 24, 1995, is the effective date of the hearing and this decision meets the 60 day requirement of sec. 77.16(9), Stats.

Pursuant to secs. 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Roger E. Nichols, by

Leo A. Beskar, Attorney
Rodli, Beskar, Boles & Krueger, S.C.
P. O. Box 138
River Falls, WI 54022-0138

Wisconsin Department of Natural Resources, by

Jim S. Christenson, Attorney
P. O. Box 7921
Madison, WI 53707-7921

STIPULATED FINDINGS OF FACT

1. Roger E. Nichols, N6877 County Road N, Beldenville, Wisconsin, 54003 owns land located in the NENW, Section 32, Township 27, Range 16 West, Town of Gilman, Pierce County.

2. Roger E. Nichols, by application dated July 24, 1972, applied to the Department of Natural Resources (Department) to enter 38 acres of land located in the aforesaid description under the Woodland Tax Law (WTL), sec. 77.16, Stats.

3. The aforesaid application of Roger E. Nichols was approved by the Department and the lands entered under the WTL by Order No. 8473 dated February 26, 1973.

4. Roger E. Nichols was informed by the Department on or about May 28, 1982 that the aforesaid WTL entry was about to expire and asked whether he wished to renew the entry. The request was made by the Department on a form entitled "Renewal Notice Woodland Tax Law".

5. Roger E. Nichols returned the renewal notice form signed and dated on or about June 27, 1982.

6. Roger E. Nichols, on the aforesaid form, also marked the box stating: "I WISH TO HAVE THE DNR PREPARE THE REQUIRED MANAGEMENT PLAN."

7. In response to the renewal notice and request of Roger E. Nichols, the Department issued Order No. 8473 on October 6, 1982.

8. By Order dated April 13, 1995, the Department declassified the aforesaid WTL lands based upon a finding that Roger E. Nichols violated sec. 77.16(7), Stats., and a declassification penalty in the amount of \$1,691.76 was assessed Roger E. Nichols. The Order was sent to Mr. Nichols by letter dated May 17, 1995.

9. Roger E. Nichols requested a hearing on the Declassification Order by letter dated June 12, 1995, which was received by the Department on June 14, 1995.

10. The University of Wisconsin-Extension published Circular G 1549.

11. The Department published the Forest Tax Law and Stewardship News, Spring, 1995.

12. Forestry Services provided the landowner by the Department consist of:

- a. A telephone conversation on or around June 1992 in which Mr. Nichols asked DNR Forester, Gary Zielske, for a list of loggers and recommendations for pine thinning.

- b. A visit to the land in 1994 by DNR Forester, Gary Zielske, to discuss issues of grazing and the thinning of pine.
- c. Correspondence from DNR Forester Gary Zielske to Roger Nichols dated June 1, 1992, a letter dated May 23, 1994, and a letter dated December 30, 1994.

13. Based upon information and belief, the landowner was not informed by the Department of changes in the Woodland Tax Law.

14. The issue in dispute in this matter is the authority of the Department to assess and the responsibility of Roger E. Nichols to pay the declassification penalty in the amount of \$1,691.76.

FINDINGS OF THE ADMINISTRATIVE LAW JUDGE

15. The Department of Natural Resources did not breach its WTL contract with Roger Nichols.

16. The Order for Renewal in 1983 constituted an agreement to the terms of the program as administered at that time and govern Mr. Nichols participation in the WTL program at present, including liability for payment of the penalty provision upon declassification.

DECISION AND DISCUSSION

The Woodland Tax Law (WTL) changed substantially between 1972, when Nichols entered the land under the program, and 1983, when he renewed his participation in the WTL Program. Nichols argues that the law as it existed in 1972 governs his current participation in the program because he entered the program prior to 1977, and because he was not given adequate notice of subsequent changes in the law which provided for the withdrawal penalty upon declassification. Nichols also alleges that nonperformance of stated services by the Department of Natural Resources foresters lead to the declassification of his WTL lands. Both of these arguments are without merit.

BREACH OF CONTRACT

The ALJ has reviewed the Order of Renewal, a WTL management plan and the landowner's application for enrollment. Nowhere in the contract as a whole is there mention of a requirement that the Department of Natural Resources provide services that Nichols

alleges are mandatory. Such services are not part of the standard WTL contract. Nichols cites a DNR publication (referenced in Stipulated Finding #11 above) which on its own terms states that provision of such services are permissible by DNR but are not mandatory.

Specifically:

- a. Paragraph 2, line 6: That is why the state provides forestry assistance to private landowners. This help is available in the form of technical advice, financial and tax incentives, and education and information.
- b. Paragraph 3, line 9: Professional foresters can help a landowner access and carry out their options.
- c. Paragraph 5, DNR Foresters provide basic forestry services to landowners. They are excellent place to start your management planning.
- d. Paragraph 5, Give a landowner 24 hours (three days) of service each year.

Provide basic information on forest conditions and needs based on your wishes and desires.

Provide information and direction on available programs and other help available.

Prepare management plans that meet your desired objectives.
(Nichols brief, p. 1-2)

The DNR correctly notes in its reply brief that paragraph d above leaves out the important introductory phrase "DNR FORESTERS CAN." Similarly, paragraph b above states that DNR Foresters CAN help but are not required to do so. Paragraphs a and c above establish absolutely no requirement that the DNR provide such assistance or services absent a request from a program participant. This language falls far short of establishing any breach of the WTL contract by the State of Wisconsin DNR. Instead, Stipulated Finding #12 indicates that the Department did respond to requests for assistance made by Nichols.

On the record before the ALJ, there is no proof whatsoever that the DNR breached its contract with Mr. Nichols. There is no proof that Nichols requested any of the services cited in the article and was refused assistance at the request of the DNR. Instead the stipulated exhibits in the record before the ALJ indicate that WTL lands entered by Nichols

were declassified because of repeated grazing on WTL lands as expressly prohibited by WTL. In fairness, it should be noted that Nichols attributes the grazing problem to a mapping error. However, this issue is not before the ALJ on the basis of the Stipulation which limits this decision to the authority of the DNR to assess the Withdrawal penalty and the responsibility of Nichols to pay the same under the Stipulated Facts.

APPLICABILITY OF WITHDRAWAL PENALTY

Nichols cites the Lapidakis, et.al. article (UW-Extension publication, G1549) referenced in Stipulated Finding #10 above for the proposition that WTL lands entered before 1977 are not subject to the Withdrawal Penalty. On its face the article does support Nichol's position:

Withdrawal Penalty: None if entered prior to 1977. If entered after 1977, 1% of value of average acre of woods in county x no. of acres in tract x no. years under law

It must be noted that the ALJ is not bound by the provisions of a UW-Extension article, even one produced, as Nichols argues, for the express purpose of informing WTL program participants about the WTL. In so much as the article provides a brief summary of the law, the law itself is binding on the ALJ under Chapter 227, Stats. (See: sec. 227.45(4), Stats.) However, there is no substantive conflict between the law and the article. Nor is the article misleading, as Nichols suggests. The Lapidakis, et. al. article correctly notes that WTL lands entered before 1977 are governed by the previous version of sec. 77.16, Stats. which did not include the Withdrawal Penalty provision. The fact situation in this matter is somewhat more complicated and involves an issue not considered in cited portions of the article. Nichols lands were plainly entered before 1977, but were subsequently renewed in 1982, well after sec. 77.16, stats. was amended to include the penalty. In the present situation, the Order for Renewal must be construed as an agreement on the part of Mr. Nichols to comply with the WTL as it was administered in 1983.

The Order for Renewal put Nichols on notice of changes in the WTL statute. The Order of Renewal reads in relevant part as follows:

Other than at the end of the contract period when the owner may renew the entry or choose not to renew the entry, the owner shall be assessed a penalty upon declassification of the lands.

Further, the Order for Renewal on its face required transmittal of the Order "forthwith" to "the owner of the land" among others.

If Mr. Nichol's interpretation of the Order and its provisions were accepted, then the provisions of sec. 77.16(7), Stats., would be meaningless. Instead the legislature chose to penalize landowners whose WTL lands were declassified at any time other than at the end of an agreed-to contract.

CONCLUSION

Nichols is not exempt from payment of penalties because in his renewal of the lands he expressly agreed to terms of the revised program sec. 77.16 which on its face penalizes landowners when the DNR declassifies land because the landowner has violated required provisions of the WTL. The DNR has not breached its contract with Nichols. Accordingly, Mr. Nichols should be liable for the declassification penalty as the changes in the law in 1977 govern his participation in the WTL program. There is no dispute as to the amount of the tax or that the penalty was correctly tabulated at \$1691.76.

ORDER


WHEREFORE, IT IS HEREBY ORDERED, that a withdrawal tax of \$1691.76 is due as calculated by sec. 77.16(11), Stats. The Town of Gilman in Pierce County is hereby authorized to add the above withdrawal tax as a special charge to the next property tax bill of the owner of record of lands located in the NENW, Section 32, Township 27, Range 16 west, Town of Gilman, Pierce County. The Department of Natural Resources shall so advise the Town of Gilman.

IT IS FURTHER ORDERED that the Order of the Department of Natural Resources is AFFIRMED and the Petition for Review be dismissed, with prejudice.

Dated at Madison, Wisconsin on January 12, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By



JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.